

EMILIANA SHIRELL
Claimant

WAL-MART

AND

AMERICAN HOME ASSURANCE
Insurance Carrier

Claimant

Respondent

Insurance Carrier

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ORDER

Respondent appeals Administrative Law Judge Bryce D. Benedict's March 22, 2002, preliminary hearing Order.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for medical treatment authorizing Lynn D. Ketchum, M.D., as claimant's treating physician.

Respondent appeals and argues that claimant's current upper extremity problems are not the result of a new and separate accident while employed by respondent. Instead, respondent contends claimant's current upper extremity problems are the continuation of problems claimant suffered as a result of injuries she received while employed by Smith Truss Company in 1994 and 1995. Respondent requests the Appeals Board (Board) to reverse the preliminary hearing Order and deny claimant's request for medical treatment.

Claimant, on the other hand, requests the Board to affirm the ALJ's preliminary hearing Order. Claimant contends her preexisting upper extremity problems have been, at a minimum, aggravated and accelerated by her repetitive and lifting work activities while employed by the respondent. Thus, claimant argues that she has suffered a new and separate accident and her current need for medical treatment is not the direct and natural progression of her preexisting injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' arguments contained in their briefs, the Board makes the following findings and conclusions:

The Board concludes that the ALJ's preliminary hearing Order granting claimant medical treatment should be affirmed. The Board finds this conclusion is supported by claimant's testimony and the opinions expressed by Dr. Ketchum in his December 17, 2001, medical report.

As a result of a previous workers compensation claim, claimant received workers compensation benefits based on a 50 to 60 percent work disability for permanent injuries she suffered to her upper extremities while working for Smith Truss Company in 1994 and 1995.

Thereafter, claimant started working for respondent in October of 1996. Her initial job responsibilities required her to run a cash register at the front of respondent's store. That cash register job required claimant to repetitively use her hands pushing store items through a scanner and she was also required to lift heavy grocery sacks into grocery carts. Those repetitive and heavy lifting activities eventually made her upper extremities symptomatic.

Because of claimant's worsening upper extremity symptoms, respondent provided claimant with medical treatment on May 15, 2001, with Dr. Joseph G. Sankoorikal. Dr. Sankoorikal had also treated claimant for her preexisting upper extremity problems in 1994 and 1995. The last time that Dr. Sankoorikal treated claimant for her 1994 and 1995 injuries was on June 3, 1995. Claimant did not have to seek medical treatment for her upper extremity problems from the period between June 3, 1995 and May 15, 2001.

At the claimant's attorney's request, Dr. Ketchum examined and evaluated claimant on December 17, 2001. He found claimant had injured her upper extremities while performing the general cash register job while employed by the respondent which required claimant to repetitively use her hands and lift grocery bags occasionally weighing up to 40 to 50 pounds. Dr. Ketchum further found claimant had multiple trigger points in the forearms and upper arms compatible with a diagnosis of overuse syndrome and myofasciitis. Sometime in the latter part of 2000, because of claimant's upper extremity complaints, respondent moved claimant to a less repetitive and lighter job in the sporting goods department. Dr. Ketchum recommended that claimant stay in that particular position, prescribed myofascial release exercises, physical therapy, ibuprofen three times a day and massage with a prescription gel.

The Board is mindful that, at respondent's request, John B. Moore, IV, M.D., saw claimant for an independent medical examination on October 9, 2001. After reviewing past

medical treatment records and conducting a physical examination of claimant, Dr. Moore's impression was claimant had subjective complaints of pain in her upper extremities without objective findings, related to repetitive lifting or standing in one position for extended periods of time. Dr. Moore further opined that claimant's condition appeared to be a continuation of the same symptoms she had exhibited since 1994 and 1995.

The Board finds, however, as did the ALJ, that claimant's preexisting upper extremity condition was aggravated and made worse from the repetitive work and lifting she was required to perform with respondent.¹ Thus, the Board finds that this aggravation constitutes a new and separate accident and was not the natural and probable consequence of the accidental injury claimant suffered in 1994 and 1995 while employed by Smith Truss Company.²

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Bryce D. Benedict's March 22, 2002, preliminary hearing Order should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2002.

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Michael Kauphusman, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation

¹ See Cox v. Ulysses, 218 Kan. 428, 433, 544 P.2d 363 (1975) (holding that an accidental injury is compensable where the work-related accident only aggravated or accelerated a preexisting injury or condition).

² See Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 263, 505 P.2d 697 (1973) (holding that the natural and probable consequence of the primary injury theory does not apply, when the facts disclosed that a new and separate intervening accident caused the increased disability).